Commentaries - Persons Qualifying for Treaty Benefits

Galo A. Maldonado L. - Ecuador

SRi

...le hace bien al país!

Steps in determining whether or not treaty benefits are available

1. Identify the person who is potentially entitled to the benefits of the treaty;

2. Determine whether that person has required connection with a treaty partner state; and,

3. Which items of income are covered by that treaty;

1. Persons who are potentially entitled to the benefits of the treaty

- The treaty applies to “persons”:

- Individuals (families, husband/wife units, family unit or separate individuals within the family unit);

- Companies (body corporate – entities treated as body corporate).

1. Persons who are potentially entitled to the benefits of the treaty

- Any other body of persons (something that is capable of bearing an income tax liability in a state should qualify as a "person" for treaty benefits / body of persons with intermediate status / trust / trustees / PE , etc.)
- PE application of treaties.
- Intermediaries – Beneficial owner (specific provisions).

2. Required connection with a treaty partner state

- Subject to tax (a person has to pay some tax – non residents respect the withholding on payments abroad);

- Liability to tax (if the person is within the scope of the tax charge, even though the person may not be obliged to pay any amount of tax – charitable foundations / exemption cases)

2. Required connection with a treaty partner state

- Criteria for liability to tax.- Personal connection between a person claiming treaty benefits and the contracting state in which that person claims residence:

  - domicile; residence; place of management / effective management; place of incorporation (risks of abuse);

  - another criterion of a similar nature.

  - Dual residence & the tiebreaker provisions

2. Required connection with a treaty partner state

- LOB articles:

- Backs up the residence definition by requiring the person claiming treaty benefits to demonstrate more substance in the person's connection with the residence state;
- Issues about application these articles - Exchange of information.

3. Item of income for which treaty protection is claimed

- Derived by, paid to "a person" covered in article 1. Connection between the person and an item of income. Beneficial ownership (independent treaty meaning);

- Determination of which person is taxable in respect of which item of income – domestic law;
  - Miscellaneous rules – anti abuse;
  - Economic Fact;
  - Economic Substance;

3. Item of income for which treaty protection is claimed

- Specific / General legislative anti – abuse rules (domestic law);
- Judicial doctrines part of domestic law;
- Specific / general anti – abuse rules in tax treaties.
- Interpretation of tax treaties provisions.

Conclusions

- The importance of an effective network of treaties of exchange of information;
- The importance to establish effective procedures to control the abuse of tax treaties (related with the previous slide);
- The necessity of clear regulations for an appropriate interpretation of tax treaties. Balance between the view of control of the tax administrations and the legitimate right of the tax payers to apply a DTA.